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UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

In re Holocaust Victims Asset Litigation

Master Docket No CV-96-4849

Memorandum of Law in Support of Lead Settlement Counsel's Application for Counsel Fees

Lead Settlement Counsel submits this Memorandum of Law in support of his petition for counsel fees, dated November 1, 2005. The petition covers the 81 month period from January 29, 1999-September 30, 2005.

I.

On April 1, 1999, at the Court's urging, petitioner agreed to serve as court-designated Lead Settlement Counsel. In view of the demanding nature of the task, the Court has determined that Lead Settlement Counsel should be compensated at the conclusion of his service on a lodestar basis on the same terms and conditions as a Special Master.[1] Lead Settlement Counsel has now successfully completed the bulk of the legal tasks required to permit the implementation of the settlement agreement. As the accompanying petition demonstrates in detail, during the past seven years, petitioner has expended more than 8,000 hours in providing necessary legal assistance to the settlement fund in connection with a kaleidoscopic array of issues.

A. Litigated Matters

Lead Settlement Counsel has appeared in twenty-nine formal legal proceedings in connection with the administration of the settlement agreement.[2] See *In re Holocaust*

[1]Lead Settlement Counsel has agreed that lodestar compensation is appropriate.

Victim Assets Litig., 225 F.3d 191 (2nd Cir 2000)(upholding limited definition of settlement classes); *In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2nd Cir. 2001)(upholding Special Master's proposed allocation formula); *In re Holocaust Victim Assets Litig.*, 282 F.3d 103 (2nd Cir. 2002)(dismissing appeal from court-imposed self-identification requirement in connection with Slave Labor II releases; vacating and remanding on issue of after-acquired companies - issue resolved favorably by stipulation on remand); *In re Holocaust Victim Assets Litig.*, (HSF), 424 F.3d 132 (2nd Cir 2005) (upholding Looted Assets class *cy pres* allocation formula; rejecting challenge to structure of settlement); *In re Holocaust Victim Assets Litig.*, (Dubbin), 424 F.3d 150 (2nd Cir. 2005) (upholding denial of attorneys fee to counsel for objector); *In re Holocaust Victim Assets Litig.*, (DRA), 424 F.3d 158 (2nd Cir. 2005) (upholding denial of *cy pres* payments to persons with no personal connection to Holocaust); and *In re Holocaust Victim Assets Litig.*, (Pink Triangle), 424 F.3d 170 (2nd Cir. 2005) (upholding denial of *cy pres* payments on group as opposed to individual basis). See also, *Matter of Swift*: *In re Holocaust Victim Assets Litig.*, (unnumbered - referred to panel in 04-1898. 424 F3d at 149, n. 14; *In re Holocaust Victim Assets Litig.*, (Ramsey Clark-Romani), 00-9593 (challenge to Looted Assets allocation formula)(withdrawn after full briefing); *In re Holocaust Victim Assets Litig.*, (Katz Estate), 04-9595 (challenge to cy pres administration of Looted Assets class)(withdrawn after full briefing); *In re Holocaust Victim Assets Litig.*, (Weiss), 00-9217 (challenge to fairness of settlement)(withdrawn after extensive motion practice and discussion); *In re Holocaust Victim Assets Litig.*, (HSF), 00-9614 (challenge to allocation plan)(withdrawn after discussions); *In re*

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[2] Each of the 29 formal legal proceedings is described in detail in the accompanying petition at pp. 27-46.

Holocaust Victim Assets Litig., (Wolf-Dunaevsky), 00-9103 (challenge to adequacy of representation)(withdrawn after motion practice); and *In re Holocaust Victim Assets Litig.,* (Bloshteyn), 00-9613, 14, (challenge to allocation formula (dismissed for non-prosecution after extensive discussions with appellants); *In re Holocaust Victim Assets Litig.,* (Schonbrun) (unnumbered)(challenge to fairness and allocation plan – withdrawn after in inquiry into client authorization); *In re Holocaust Victim Assets Litig.,* (Wolinsky)(unnumbered)(challenging notice given to disabled persons)(withdrawn); *In re Holocaust Victim Assets Litig.,* 256 F. Supp. 2d 313 (EDNY 2002)(directing banks to pay additional compound interest of $5 million on funds held in escrow account); *In re Holocaust Victim Assets Litig.,* 02-3314 (Block, J.)(motion to construe settlement agreement to exclude after-acquired companies from receiving slave labor II releases)(successfully resolved by stipulation permitting after-acquired companies to receive slave labor I, but not slave labor II, releases); *In re Holocaust Victim Assets Litig.,* (unnumbered)(Block, J.) (motion demanding access to additional information needed to administer the bank account claims process; and for leave to establish a NYC claims facility)(resolved successfully by negotiation after lodging motion papers with Court resulting in the June 10, 2004 Amendment 3 to the Settlement Agreement); *In re Holocaust Victim Assets Litig.,* 105 F. Supp.139 (EDNY 2000)(opinion upholding fairness of settlement under Rule 23(e)); *In re Holocaust Victim Assets Litig.,* 2000 U.S. Dist LEXIS 20817 (EDNY November 22, 2000)(opinion upholding allocation plan); *In re Holocaust Victim Assets Litig.,* 270 F. Supp 2d 313 (EDNY 2002)(opinion setting attorneys fees; denying risk multiplier); *In re Holocaust Victim Assets Litig.,* 2003 U.S. Dist. LEXIS 20686 (EDNY November 17, 2003)(opinion allocating supplemental distribution); *In re Holocaust Victim Assets Litig.*, 302 F. Supp. 2d 89 (EDNY 2004), rehearing den., 311 F. Supp.2d 363 (EDNY) (rejecting objections to allocation of Looted Assets funds; rejecting fee application); *In re Holocaust Victim Assets Litig.*, 311 F. Supp.2d 407, reconsideration denied, 314 F. Supp. 155 (EDNY)(rejecting cy pres payments to gay and disabled communities); *In re Holocaust Victim Assets Litig.* (day-long fairness hearing held by the District Court on November 29, 1999); *In re Holocaust Victim Assets Litig.* (all-night telephone connection to fairness hearing held in Jerusalem on December 14, 1999); *In re Holocaust Victim Assets Litig.* (day-long hearing on November 20, 2000 on the Special Master's proposed plan of allocation); and *In re Holocaust Victim Assets Litig.* (day-long hearing on April 29, 2004 on the possible allocation of residual funds).

As the above-cited proceedings demonstrate, Lead Settlement Counsel has successfully briefed and argued seven plenary appeals to the Second Circuit from rulings of the District Court on aspects of the settlement; fully briefed and negotiated the dismissal of three additional Second Circuit appeals from orders of the District Court; and secured the dismissal of six additional appeals challenging aspects of the District Court's administration of the settlement after substantial motion practice and sustained negotiation.

In addition to successfully defending sixteen appeals to the Second Circuit, petitioner successfully litigated three plenary trial-level proceedings before Judge Block involving: (1) the payment of $5 million in compound interest on the settlement's escrow fund; (2) the eligibility of after-acquired Swiss companies for Slave Labor II releases;

and (3) increased access to information needed to administer the Deposited Assets claims program.

Lead Settlement Counsel has also appeared in at least ten formal proceedings in the District Court involving aspects of the settlement's administration, including multiple hearings on the fairness of the settlement and the fairness of the plan of allocation and distribution.

B. Negotiated Matters

In addition to representing the settlement fund in twenty-nine formal legal proceedings, Lead Settlement Counsel has engaged in three extensive rounds of negotiations with the defendant banks resulting in material amendments to the settlement agreement. The first round of negotiations in 2000 resulted in the adoption of Amendment 2 to the settlement agreement dealing with: (1) claims for the return of looted artwork; (2) access to information needed to administer the Deposited Assets claims program, including the publication of the names of 21,000 account holders; (3) acceleration of the payment of the settlement principal in order to generate $15-$20 million in additional interest income to fund the Deposited Assets claims program; and (4) the establishment of a modest insurance claims program.

The second round of negotiations in 2003 resulted in defendants' agreement that Swiss companies acquired after the end of WW II do not qualify for Slave Labor II releases.

The third round of negotiations in 2004-05 resulted in Amendment 3 to the settlement agreement: (1) authorizing a New York claims facility; (2) providing for the publication of 3,100 additional names of account holders; and (3) permitting CRT II access to the Total Accounts Data Base.

C. Congressional Proceedings

In addition to the twenty-nine formal legal proceedings and the three rounds of negotiations, Lead Settlement Counsel petitioned Congress on the settlement's behalf on two occasions. Working closely with Mel Weiss, Lead Settlement Counsel successfully petitioned Congress in 2001to exempt from federal income tax all interest earned on the $1.25 billion settlement fund, as well as all payments received by beneficiaries. The federal income tax exemption provided a tax saving to the settlement fund of approximately $20 million, and increased the net value of every payment to a beneficiary by the beneficiary's marginal federal income tax rate.

The second approach to Congress involves an ongoing effort to secure reversal of the effects of the Supreme Court's unfortunate opinion in *Garamendi*. Lead Settlement Counsel is seeking to persuade Congress to authorize states to require the disclosure of Holocaust related claims information by any insurance company wishing to do business in the state.[3]

D. Structural Services

Finally, Lead Settlement Counsel has played a major role in: (1) developing and implementing the settlement's bifurcated structure; (2) designing and executing, with the invaluable assistance of Morris Ratner, two notice programs; (3) assisting Special Master Gribetz in designing and structuring claims programs for the Slave Labor, Refugee and Deposited Assets classes; (4) assisting in designing a cy pres mechanism for the Looted

[3] No fees are sought in connection with the effort to persuade Congress to reverse *Garamendi,* since the efforts have not yet been successful.

Assets class; and (5) providing legal advice on a daily basis to class members and to the settlement's administrators at every stage of the process on issues ranging from federal income taxes to Swiss immigration law.

II.

The accompanying petition sets forth the time charges attributable to each task as reflected in petitioner's contemporaneously maintained time records. The time charges demonstrate that Lead Settlement Counsel has necessarily expended more than 8,000 hours in providing legal services to the settlement fund during the past six and three-quarter years.

Under existing Second Circuit practice, no interest is payable in connection with the deferred payment of a lodestar fee. Instead, counsel is authorized to utilize current hourly billing rates in calculating the lodestar. *Le Blanc-Sternberg v. Fletcher,* 143 F.3d 748, 764 (2nd Cir. 1998). See also *Missouri v. Jenkins,* 491 U.S. 274 (1989). Lead Settlement Counsel's current hourly billing rate, which corresponds to the going rate payable to an attorney of his standing and experience in the New York City legal community, is $700 per hour. The total lodestar fee reflected in the accompanying petition is $5,731,900. In view of the unique nature of this litigation, and in keeping with the practices of the Special Masters, Lead Settlement Counsel deems it appropriate to discount the lodestar fee by approximately 25% to $4,088,500.

III.

In view of the unique nature of this litigation, Lead Settlement Counsel has carefully considered whether to further discount his lodestar. For the following reasons, Lead Settlement Counsel has determined that a further discount is not appropriate.

First, counsel has already respected the unique nature of this litigation by waiving "common fund" fees for having played a significant role from January, 1997-January, 1999 in achieving the settlement. Under Second Circuit practice, the usual counsel fee payable in connection with achieving a $1.25 billion class action settlement would have approximated $100 million. Counsel's share of such a fee would have approximated $10 million. Even if the common fund fees were steeply discounted, counsel's fee for having achieved the settlement would have approximated $5 million. Having waived approximately $5-$10 million in fees for achieving the settlement, counsel is not prepared to further discount his fees.

Second, Lead Settlement Counsel's legal efforts on behalf of the settlement fund have resulted in an increase in the value of settlement fund that exceeds by many multiples the lodestar fee sought by counsel. Lead Settlement Counsel's litigation efforts resulted in the payment of $5 million in additional compound interest payments on funds held in the settlement's escrow account. Lead Settlement Counsel's negotiation efforts resulted in the accelerated payment of the settlement principal, enabling the settlement fund to earn between $15-$20 million in additional interest. Lead Settlement Counsel's efforts, in conjunction with the efforts of Mel Weiss, resulted in the exemption from federal income taxation of all interest earned on the settlement principal, a benefit conservatively valued at $15-$20 million. Finally, Lead Settlement Counsel's efforts resulted in the establishment of a modest insurance claims program with a theoretical value of up to $50 million, and a practical value of approximately one million dollars. At a minimum, therefore, Lead Settlement Counsel's efforts have increased the settlement fund by more than nine times the amount of counsel's requested lodestar fees, rendering a further discount inappropriate.

Finally, the quality and intensity of Lead Settlement Counsel's efforts make a further discount particularly unwarranted. Lead Settlement Counsel has been successful in each of the multiple tasks described in the accompanying petition, but only after the expenditure of intensive effort. In fact, the challenging nature of the work and the quality and success of counsel's efforts warrant a multiplier, not a discount. Comparison with the District and Circuit's most relevant precedent reveals that the discounted lodestar request in this case is already far below the prevailing rate for services of the nature and quality provided to the settlement by Lead Settlement Counsel.

In *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.* 396 F.3d 96 (2nd Cir. 2005), plaintiffs' counsel, after seven years of litigation in this District , achieved an anti-trust settlement valued at $3.3 billion in compensatory payments. Plaintiffs' counsel in *Visa* sought fees of $609 million, approximately 18% of the compensatory recovery. The District Court, noting that plaintiff-counsels' lodestar was $62 million, declined to award a fee that multiplied lodestar by a factor of 9.5. Instead, Judge Gleeson awarded a fee of $220 million, or 6.5% of recovery, which he noted was approximately 3.5 times the lodestar. The Circuit affirmed.

In this case, Lead Settlement Counsel has, likewise, labored for approximately seven years in this District. The settlement fund being defended and administered is $1.25 billion, as opposed to the $3.3 billion in *Visa*. The discounted lodestar is approximately $4 million, as opposed to the $62 million in *Visa*.[4] Lawyers in each case

[4] In order to minimize costs to the class, Lead Settlement Counsel has performed most of his tasks without assistance, leading to an expenditure of billable hours that was far lower than overlapping billings by

achieved a high level of success. Lead Settlement Counsel asks that his lodestar be *discounted* by approximately 25%. In *Visa*, counsel received a *multiplier* of 3.5 of lodestar.

Since Lead Settlement Counsel's request for fees is already proportionately far lower than the award of fees in *Visa* it would be inappropriate to discount the fees further.

Conclusion

Accordingly, Lead Settlement Counsel respectfully requests an award of lodestar fees of $4,088,500.

Dated: December 16, 2005
New York, New York

Respectfully submitted,

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multiple attorneys working on aspects of the same task. In addition, Lead Settlement Counsel has sought to work efficiently, seeking to perform tasks in a single sitting.